



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eagle Timber, Inc.

File: B-239386

Date: August 28, 1990

Alan I. Saltman, Esq., Bogle & Gates, for the protester.
Lori D. Polin, Esq., Office of the General Counsel,
Department of Agriculture, for the agency.
Paula A. Williams, Esq., Paul Lieberman, Esq., and John F.
Mitchell, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest that second-low bidder under timber sale should have been given an award at its bid price, rather than offered an award at the higher price bid by the high bidder, which was determined to be nonresponsive, is denied because the applicable timber sales regulation permits the agency to offer the award to the next low bidder at the higher bidder's price in this situation.

DECISION

Eagle Timber, Inc. protests the manner in which the Forest Service, U.S. Department of Agriculture, conducted the Refugio Timber Sale in the Tongass National Forest. Eagle Timber protests that the agency improperly offered it the sale at the higher price bid by an unqualified bidder rather than at the lower price it bid, and, when Eagle Timber declined to accept award at the higher price, the agency decided to reject all bids and to reoffer the timber sale.^{1/}

^{1/} While Eagle Timber casts its protest in terms of the propriety of the agency's decision to cancel and reoffer, this argument is misplaced. In fact, Eagle Timber was provided an opportunity to accept the sale and the cancellation was effected only after Eagle Timber declined to accept an award, leaving no extant responsible bidders, which necessitated the reoffering. Even if we considered the protest in terms of the propriety of the cancellation, the fact that there were no extant responsible bidders would provide a compelling reason to cancel. See Federal

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We deny the protest.

The Forest Service sells timber from National Forest System lands under the authority of the National Forest Management Act (NFMA), 16 U.S.C. § 472a (1988), and implementing regulations under 36 C.F.R. § 223 (1990). The applicable regulations state in relevant parts:

"§ 223.100 Award to highest bidder.

"The sale of advertised timber shall be awarded to the responsible bidder submitting the highest bid that conforms to the conditions of the sale as stated in the prospectus. . . ."

"§ 223.102 Procedures when sale is not awarded to highest bidder.

"If the highest bid is not accepted and the sale is still deemed desirable, all bids may be rejected and the timber readvertised; or, if the highest bidder cannot meet the requirements under which the timber was advertised or the withholding of award to him is based on one or more of paragraphs (c), (d), and (e) of § 223.100, award at the highest price bid may be offered to the next highest qualified bidder . . . until the award is accepted by one or refused by all of the qualified bidders."

"§ 223.103 Award of small business set-aside sales.

"If timber is advertised as set aside for competitive bidding by small business concerns, award will be made to the highest bidder who qualifies as a small business concern and who has not been determined by the Small Business Administration to be ineligible"

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Acquisition Regulation § 14.404-1(c)(6). Accordingly, our decision is directed at the question of the propriety of the agency's decision to offer the sale to Eagle Timber at the higher price only.

The Refugio Timber Sale was a small business set-aside which was advertised as a sealed-bid timber sale. At bid opening on November 21, 1989, the Forest Service received two bids; Premium Alaska (1989) Fishing Corporation submitted a bid of \$2,504,848.40, and Eagle Timber submitted a bid of \$1,875,235.10. Both bids were higher than the \$1,831,076 minimum acceptable advertised value of the sale. Premium Alaska was declared the apparent high bidder and was offered the sale, subject to completion of an Equal Employment Opportunity compliance check performed by the Department of Labor and a financial review to determine responsibility. When Premium Alaska failed to provide financial data within the time limits set by the agency, the Forest Service referred the matter to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures under the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1988). The SBA declined to issue a COC because Premium Alaska failed to timely provide required information. The Forest Service then rejected the bid finding Premium Alaska nonresponsible for failure to provide evidence of financial resources. Thereafter, the agency offered the sale to Eagle Timber, the next qualified bidder, at Premium Alaska's bid price.

On March 26, 1990, Eagle Timber protested to the Forest Service that it was improper to offer it the award at the bid submitted by Premium Alaska, an "unqualified" bidder. Eagle Timber alleged that it was the only responsible bidder, thus its bid was the highest bid on the timber sale and, therefore, the firm was entitled to the award at its bid price. The Forest Service denied Eagle Timber's protest on the basis that Premium Alaska's bid properly was considered the highest bid received from an eligible bidder. The agency pointed out that to be an eligible bidder for the Refugio Timber Sale, a prospective bidder had to be a qualifying small business firm and submit bid forms along with the required bid guarantee; Premium Alaska met both requirements. The Forest stated that Premium Alaska's bid was rejected because the company was unable to meet all the conditions required for award. The Forest Service indicated that since Eagle Timber's March 26 letter of protest constituted a refusal of the agency's offer for the timber, the agency intended to readvertise the timber which had been refused by all qualified bidders. Eagle Timber then filed this protest with our Office on April 20.

The applicable timber sale regulations appear to provide conflicting guidance. Under 36 C.F.R. §§ 233.100 and 223.103 award is to be made to the highest bid by a qualifying bidder (or small business bidder), while section 223.102 appears to give the agency broad discretion to

reject all bids and readvertise if the highest bid is not accepted. Thus, if the bidder submitting the highest bid is "not accepted" or cannot "meet the requirements under which the timber was advertised," the agency may reject all other bids, including the highest bid by the otherwise qualifying bidder. The regulations are consistent if sections 223.100 and 223.103 are understood to provide that award should be made to the high qualified, responsible bidder, subject to the procedures outlined in section 223.102. Under these latter procedures where, as here, the highest bidder is found nonresponsible or otherwise cannot meet the requirements under which the timber was advertised, the agency may offer the award at the highest price bid to the next highest qualified bidder.

One effect of section 223.102 is to provide the contracting officer the discretion to consider whether the highest bid which was rejected because the bidder could not meet all the award conditions represents a reasonable sales price. If so, the contracting officer has the flexibility to use the procedures under 36 C.F.R. § 233.102, to readvertise or to offer the sale to the next qualified bidder at the highest bid price. In our view, sections 223.100 and 223.103 prohibit award to other than the high qualifying bidder; they do not countermand the clear authority in section 223.102 to readvertise if the high bidder cannot meet requirements of the sale, such as the requirement in this case that the successful bidder be a responsible small business concern.

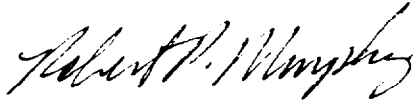
The contracting officer noted that since 1987 there has been a consistent pattern of "overbids," i.e. winning bids in excess of the minimum advertised values for timber sales in the Tongass National Forest. Possibly concerned that Premium Alaska's bid might constitute a reasonable price for the timber being sold, when the firm was found non-responsible the agency elected its option under the regulation to offer the sale to the protester at a price equal to the highest bid.^{2/} Since Eagle Timber declined to

^{2/} Eagle Timber also argues that the Forest Service Timber Sale Preparation Handbook supports the position that it is entitled to award at its bid price. However, since the handbook provides internal guidance, failure of the agency to follow it would not provide a valid basis for protest. BMV, Div. of Harsco Corp., B-233081; B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67. In any case, we disagree with Eagle Timber's interpretation of the handbook guidance, since it is inconsistent with the applicable procedures provided for

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accept the award on this basis, the Forest Service had no choice under the regulation but to reject the protester's bid, which then required the agency to readvertise in order to sell the timber since there were no other bids.

The protest is denied.



for James F. Hinchman
General Counsel

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under 36 C.F.R. § 223.102. We note also that there is no allegation here that the contracting officer's actions were motivated by any reason other than obtaining the best sales price for the government.